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In the

Superior Court of the United States

OCTOBER TERM, 1965

No. ~~826~~ 443

FRANK COSTELLO
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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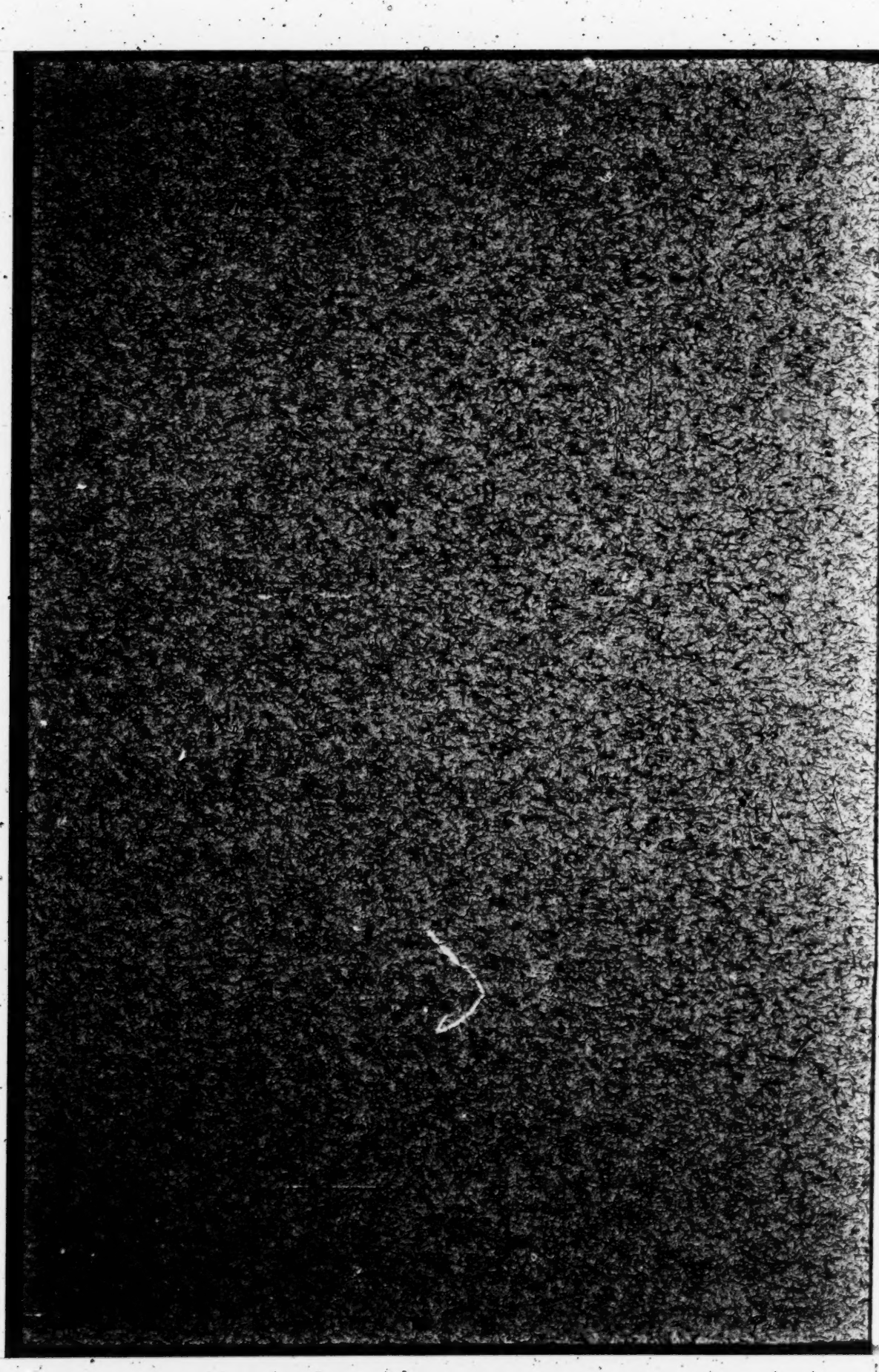

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To The Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States

The petitioner, Frank Costello, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case, October 29, 1965.

The opinion of the Court of Appeals (Waterman, Friendly and Smith, Circuit Judges) is thus far unreported and is reprinted in the Joint Appendix to Petitions for Petitioners Marchetti and Costello beginning on Page 1 thereof. Petition for rehearing was denied without lengthy opinion, but the court referred therein to its opinion, of date November 26, 1965, in *United States vs. Alfred Grassia,* which

is also reprinted at page 24a of the above mentioned joint appendix. There was no written opinion filed in connection with the district court proceedings.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

STATEMENT OF THE CASE

Petitioner Costello here seeks relief from the action of the Court of Appeals in affirming judgment of the United States District Court for the District of Connecticut in two separate actions. In one, Costello was charged, along with petitioners James Marchetti and Carl Gjanci, with having conspired wilfully to fail to pay, in violation of 26 U. S. C. Sec. 7203, the special occupational tax imposed by 26 U. S. C. Sec. 4411 upon those engaged in the business of accepting wagers, for themselves or for others. In a separate indictment, Costello was charged substantively, in two counts, with having violated 26 U. S. C. Sec. 7203: (1) in failing to pay the special occupational tax required by 26 U. S. C. Sec. 4411, and (2) in failing to register as required by 26 U. S. C. Sec. 4412. Marchetti and Gjanci were similarly accused of the substantive offenses in separate indictments. The four indictments against the three defendants were ordered consolidated, upon motions of the goverment, (A. 30a)* for trial before a single jury presided over by Chief Judge Timbers. All points raised herein apply equally to Costello's convictions on both indictments and no further differentiation between them will be made.

On December 14, 1964, a jury found all three defendants guilty and Chief Judge Timbers, on January 11, 1965 sentenced Costello to serve one year in prison and pay a fine of $10,000.00, plus a suspended sentence and probation on one of the substantive counts.

Appeal was taken to the Court of Appeals for the Second Circuit; that court, on October 29, 1965, affirmed the convictions. A petition

* The symbol A. plus a page reference refers to the joint appendix of appendix of appellants Costello and Marchetti in the Court of Appeals. A page reference without any preceding symbol refers to the appendix of those two petitioners in this court.

for stay of mandate was filed with the Court of Appeals, which petition was granted, for a period of thirty days, on November 17, 1965. Meanwhile, on November 15, 1965, the date of this court's ruling in the case of *Albertson, et al vs. Subversive Activities Control Board* ——— U. S. ———, 34 L.W. 4014 (1965), a petition for rehearing was delivered to the Court of Appeals. On November 17th, Judge Waterman granted leave to file the petition, but on November 26th, the court denied rehearing.

QUESTIONS PRESENTED

1. Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson vs. Subversive Activities Control Board* ——— U. S. ——— (1965), overrule *United States vs. Kahriger*, 345 U. S. 22 (1953) and *Lewis vs. United States*, 348 U. S. 419 (1955)?

2. Where the sole object of these prosecutions—proudly announced by the United States Attorney's office, clearly recognized and so applied by the trial and sentencing judge—was to crack down on the state offense of gambling, have not these federal occupational tax provisions been enforced in a manner violative of the Tenth Amendment?

3. Does not the conscious generation of publicity, of an extremely sensational and prejudicial nature, by the office of the United States Attorney, deny to an accused the right guaranteed by the Sixth Amendment to the Constitution of the United States to a "speedy and public trial, by an impartial jury" and amount to a denial of liberty without due process of law in violation of the Fifth Amendment?

REASONS FOR ALLOWANCE OF THE WRIT

STATEMENT OF RELEVANT FACTS AND PROCEEDINGS

The petitioner Frank Costello, with more than forty others similarly charged, was arrested on the afternoon of October 8, 1964 in Bridgeport, Connecticut. Most of those arrested had been indicted on

October 6th, at which time the indictments were ordered impounded by the court. (A. la, A. 99a)

The actual arrests were made amidst fantistic trumpeting and braying by the office of the United States Attorney. Even prior to 2:36 P.M., October 8, 1965, when the court vacated the impounding order, (A. 18a) the Government had gathered reporters at a private law office in Bridgeport; (A. 78a, A. 155a) later, they were taken to the headquarters of the Internal Revenue Service where they could conveniently photograph those arrested as they were brought in (A. 149a, A. 151a, A. 155a). *The Bridgeport Post* of October 8, 1964, printed banner headlines and an extensive article proclaiming the arrests before some defendants were actually arrested (A. 77a, A. 85a, A. 87a); all of the news media—newspapers, radio and television—were saturated with details of the raids and individuals involved. (A. 77a-78a, A. 145a-160a) At or before the time many or most of the defendants were arrested, the Government distributed to the press a prepared statement marked, "FOR IMMEDIATE RELEASE"; "U. S. TREASURY AGENTS STAGE MASSIVE RAIDS" (A. 78a-79a)

No less shocking than the Government's conscious build up to fever pitch of the publicity was the *type of information* given to the Fourth Estate. The original press release ranged from giving "testimony" as to one of the necessary elements of the case ("United States Attorney Eagan noted that not one individual in the Bridgeport area currently holds an occupational tax stamp") to the making of totally extraneous but highly prejudicial statements. ("The special agents were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate"). (A. 78a) In the days that followed, the Government continued in the same tenor—with the same fervor. The following are only a few of the more shocking examples:

> "Mr. Owens today said funds from the gambling operation in Bridgeport were supporting 'prostitution and skylocking.'"
>
> *The Bridgeport Post,* Oct. 9, 1964, p. 1 (A. 80a, A. 153a)

> "Mr. Owens said Costello and Marchetti have previous convictions for income tax violations."
>
> *The Bridgeport Post,* Oct. 9, 1964, p. 1 (A. 80a, A. 153a)

" 'Thank God, you finally broke it up—my husband's gambling has ruined our home!'

This remark was one of more than a dozen emotional expressions of gratitude voiced by housewives who contacted Howard T. Owens, Jr., chief assistant U. S. attorney in the wake of the gambling raids by Treasury agents and State police on Thursday.

'Some of the women even cried as they told me how gambling by their husbands had caused them continuous hardship' Mr. Owens said.".

The Bridgeport Post, Oct. 10, 1964, p. 1 (A. 81a, A. 157a)

Also among those arrested, Mr. Owens said, were men believed to be the 'key' men in the local syndicate.

Mr. Owens declined to say whether all of the 45 persons arrested were members of the syndicate.

The Bridgeport Post, Oct. 10, 1964, p. 1 (A. 81a, A. 157a)

A jury was impaneled in the instant case on November 30, 1964 and the evidentiary portion of the case was to begin a few days later, on December 2nd after the impaneling of other juries. In the interim, *The Bridgeport Post* on the evening before petitioner's trial was to start, carried a story on its first page reporting that six other defendants had pleaded guilty, and quoted chief assistant U. S. Attorney Owens as having said, ". . . the government expects others to change their pleas to 'guilty'." (A. 141a).

On the basis of this publicity, and citing the court to the earlier publicity at the time of the raids, petitioner's trial counsel moved for a mistrial and change of venue, which motions were denied by the court. (A. 5a, A. 100a-101a, A. 207a-217a).

After an eight day trial, the jury found all three defendants guilty. After conviction, counsel filed motions for Acquittal and for a New Trial—and in Arrest of Judgment, raising all the questions here presented. (A. 11a, A. 105a, A. 57a-88a) On January 11, 1965, before imposing sentence, the court denied all motions on their merits. (A. 342a) Before passing on to sentencing, Judge Timbers, who had presided over all stages of the proceedings, announced, in part, concerning these "tax prosecutions":

"While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling.

While it is perfectly true, and no one knows better than the Court, that the charge against these defendants was not that of gambling, it is equally true that the prosecutions never would have been brought and there never would have been convictions but for extensive gambling and accepting of wagers as demonstrated by the evidence.

As this Court has observed before, one of the handmaidens of vice in any community—here graphically demonstrated in the Bridgeport community—one of the handmaidens of vice is that of gambling. The other two, with which this Court has dealt severely and will continue to deal severely, are those of narcotics and prostitution. Of course it is well known that the revenue from gambling is the financial basis or keystone upon which much of crime is built.

The Court does not intend, in imposing sentence here, to deal out the slap on the wrist which has characterized sentences imposed by the State Courts for violations of the State gambling laws. . . ." (A. 344a-345a)

THE WAGERING TAX STAMP PROVISIONS VIOLATE PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION

Shortly after passage of the "revenue" legislation here under attack, this Court in *United States vs. Kahriger,* 345 U. S. 22 (1953) and in *Lewis vs. United States,* 348 U. S. 419 (1955) sustained the validity of these statutes as against a claim they were violative of the Fifth Amendment privilege against self-incrimination. At that time, Mr. Justice Black, one of three dissenters, commented:

"If this would not violate the Fifth Amendment privilege against self-incrimination, it is hard to think of anything that would."

Lewis vs. United States, supra, at 425.

Now, a decade later, we would strongly urge the Court to take a second searching look at the privilege—this statutory and regulatory scheme—and at its decisions in *Kahriger* and *Lewis*.

Among the questions which must be answered by a registrant, as contained in the Special Tax Return And Application For Registry—Wagering (Internal Revenue Service Form 11-c) (A. 73a) are the following:

> "5. Are you engaged in the business of accepting wagers on your own account?
>
> "If yes . . . give
>
> "(a) Name and address where each such business is conducted . . .
>
> "6. Do you receive wagers for or on behalf of some other person or persons?
>
> "If yes, give true name and address of each such person." (A. 73a.)

The incriminatory nature of these questions would seem clear. The court's reasoning in *Kahriger* and *Lewis*—that registration and purchase of the stamp *only* indicates an intention to carry on such activities in the "future"—is difficult or impossible to justify in view of the contents of the required return.

In the last few years, the Fifth Amendment privilege, reflecting our "most noble aspirations," has been given full rather than grudging application. *Murphy vs. Waterfront Commission*, 378 U. S. 52, 55 (1964); *Malloy vs. Hogan*, 378 U. S. 1 (1964). Now, mere scant weeks ago, this Court unanimously held unconstitutional strikingly similar provisions of the Subversive Activities Control Act of 1950. *Albertson vs. Subversive Activities Control Board* —— U. S. ——, 34 L. W. 4014 (1965). Counsel has read and re-read *Albertson* and can see no reasonable ground upon which to hold otherwise as to the wagering occupational registration requirements.

In denying petitioner's request for rehearing, the Court of Appeals referred to its decision in *Grassia vs. United States*, —— F. 2d —— (1965), decided the same day:

> "Recognizing that the rationale of *Albertson* v. *Subversion Activities Control Board*, —— U. S. —— (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to

overrule its previous decisions in *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 438 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination." (26a)

It is humbly submitted that this Court ought now resolve for the lower courts this seeming direct conflict between its earlier decisions on the wagering tax stamp and the recent unanimous decision in *Albertson*.

AS APPLIED IN THESE PROSECUTIONS AT LEAST THE WAGERING TAX STATUTES VIOLATE THE TENTH AMENDMENT

In *Kahriger* this Court also held that Congress, in passing the here challenged legislation, ostensibly a revenue measure, had not violated the Tenth Amendment, although Mr. Justice Frankfurter strongly dissented, branding the revenue label "verbal cellophone." *United States vs. Kahriger*, 345 U. S. at 38. Later, in *United States vs. Calamero*, 354 U. S. 351 (1957), the Court indicated that it could not peek through that cellophane to any other possible Congressional motive lest the constitutionality of the legislation be placed in doubt. 354 U. S. 351 at 358. In this case we have seen the complete rending and discarding of the cellophane.

The application and enforcement of a federal statute—constitutionally sound on its face—can result in a constitutional denial. *Yick Wo vs. Hopkins*, 118 U. S. 356 (1885); *Snowden vs. Hughes*, 321 U. S. 1 (1943). Here, the actions and statements of both the Government and the court make it clear that these particular federal prosecutions were conceived, planned and carried forth—and that the petitioners were convicted and punished—only for the crime of "gambling," in direct violation of the Tenth Amendment.

In earlier portions of this petition, counsel has set forth only fragments of the statements made before, during and after these prosecutions by both the office of the United Sates Attorney and by Chief Judge Timbers of the United States District Court for the Disrict of Connecticut. For the Court fully to grasp the thrust of these

prosecutions, and the full flavor of the actions of both the Justice Department and the trial court, petitioner would ask the Court to read a bit more extensively in appelants' appendix below. (A. 70a-71a, A. 79a-82a, A. 176a-186a, A. 344a-346a)

The responsible federal officials in Connecticut, both prosecutorial and judicial, have done exactly what this court held, in *Calamero*, may not be done. These particular prosecutions, openly and notoriously, were conducted for the purpose of destroying gambling in Connecticut—in the stated hope of drying up the source of revenue which was the *only* permissible justification for the very congressional authority relied upon. Under these circumstances, the use of the statute violated the Tenth Amendment.

THE DELIBERATELY GENERATED PREJUDICIAL PUBLICITY VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS

Petitioner has earlier set forth the general outlines of the publicity campaign here carried out by the Government. A huge bally-hoo atmosphere created at the "kickoff" of these prosecutions was supplemented as the days went on by the feeding to the press of a mass of extraneous, improper and highly prejudicial statements.

As this court well knows, the accommodation of a free press with the necessity of insuring a fair trial is a particularly knotty problem. *Irvin* v. *Dowd*, 366 U. S. 717 (1961). Here, however, we deal not with that accommodation, but rather with deliberate and conscious generation of prejudicial publicity by the Government. From time to time this court has had to set certain limits on prosecutorial conduct; *Berger vs. United States*, 295 U. S. 78 (1935); we would submit that such a time is again at hand.

CONCLUSION

1. Each of the questions presented herein poses important questions of federal criminal law which should be decided by this Court.

2. The *Albertson* decision *at least* raises serious doubts as to the present viability of *Kahriger*, *Lewis* and the wagering tax statutes, and this Court should now furnish guidance to the lower federal courts.

3. In its supervisory role over the administration of federal criminal justice and procedure, this Court should define the permissible limits of prosecutorial conduct regarding the deliberate generation of prejudicial publicity.

The writ of certiorari should be granted.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that court herein, being the cases numbered and entitled in its docket No. 29524, *"United States of America vs. Frank Costello, et al,"* and No. 29525, *"United States of America vs. Frank Costello,"* and that the judgment of that court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated this 13th day of December, 1965.

FRANK COSTELLO
Petitioner

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With him on the Petition